NO. 83-6213

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONNIE RAY EVANS,

Petitioner,

-v-

THE STATE OF MISSISSIPPI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

I. Preface

Petitioner, Connie Ray Evans, prays that a Writ of Certiorari issue to review the judgment denying his application for leave to file petition for writ of error corem nobis by the Mississippi Supreme Court on November 30, 1983.

II. Opinions Below

State Court. The opinion of the Supreme Court of Mississippi upholding on direct appeal Evans' conviction and sentence is reported as Evans v. State, 422 So.2d 737 (Miss. 1982), cert. den., ____ U.S. ____, 77 L.Ed.2d 314, 103 S.Ct. 2111 (1983). The opinion of said Court denying the application for leave to file petition for writ of error coram nobis is reported as Evans v. State, 441 So.2d 520 (Miss. 1983).

III. Jurisdiction

Petitioner seeks to invoke the juridiction of the Court by way of a Petition for Writ of Certiorari under the authority of 28 U.S.C. § 1257(3). Respondents submit jurisdiction is improperly invoked. Our position in opposition to jurisdiction is more fully developed hereafter in our argument.

IV. Constitutional and Statutory Provision Involved

Petitioner has with the exception of citing Miss. Code Anno. § 99-35-145 (1972) (See Appendix) adequately identified and set forth the constitutional and statutory provisions involved in this cause. For the reasons stated in respondent's arguments, the claims raised in the petition are not properly before the Court.

V. Statement of the Case

The genesis of this petition is the capital murder of Artun Pahwa, effected on April 8, 1981, during an armed robbery of the Jackson, Mississippi, convenience store in which Pahwa worked. Following an indictment for capital murder returned by a Hinds County grand jury, petitioner pled guilty on October 12, 1981, and went to trial on the issue of sentence. Thereafter, on October 13, 1981, a jury sentenced petitioner to death, producing a mandatory appeal to the Supreme Court of Mississippi [Miss. Code Anno. §§ 99-19-101 et seq. (Cum. Supp. 1983)]. In a written opinion dated November 3, 1983, [Evans v. State, 422 So.2d 737 (Miss. 1982)], the Court affirmed the sentence. Petition for rehearing was denied on December 15, 1982. 1/ This Court denied

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1/ On direct appeal petitioner urged the following eleven assignments of error as meriting reversal:

I. The trial court erred in striking for cause at the State's request a juror who was not irrevocably committed, before trial began, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

II. Did the trial court err in admitting evidence of defendant's prior non-violent criminal record during the State's case in Chief in the sentencing phase of a capital murder trial under the theory that the capital murder was "committed by a person under sentence of imprisonment" where the defendant was under suspended sentences, but was not incarcerated, under parole, or an escapee at the time of the capital murder?

III. Did the trial court err in admitting into evidence, at the sentencing phase of a death penalty case, proof of matters admitted by the defendant by his plea of guilty in open court, where such proof was not related to the aggravating circumstances set forth in § 99-19-101, Miss. Code Anno. (1972) as amended?

IV. The trial court erred in overruling defendant's motion for a mistrial when officer Willie Allen testified that the deceased's seven or eight month pregnant wife came to the scene of the crime shortly after her husband was killed.

V. The trial court erred in allowing Alfonso Artis to testify that the defendant said he killed the victim because he was "cold hearted" over defense objections.

VI. The trial court erred in allowing the prosecution to cross examine the defendant's mother, Mary Lewis, concerning the defendant's prior juvenile record.

petition for writ of certiorari on May 16, 1983, and denial of petition for rehearing followed 2/ Evans v. Mississippi, ____ U.S. ____, 77 L.Ed.2d 314, 103 S.Ct. 2111(1983).

On July 1, 1983, application for leave to file a petition for writ of error coram nobis pursuant to Miss. Code Ann. § 99-35-145 (1972) with the Mississippi Supreme Court. On November 30, 1983, the Court filed a written opinion denying the application holding that the claims which had been raised on direct appeal were res adjudicata and the remainder were procedurally barred. See: Evans v. State, 441 So.2d 520 (Miss. 1983). Rehearing was denied on January 25, 1984. Execution was thereafter rescheduled for February 15, 1984.

(Footnote 1 Continued)

VII. The trial court erred in refusing to supress [sic] or to rule on the admissibility of a letter written in the jail by the defendant to Alfonso Artis, prior to the defendant's testifying.

VIII. The trial court erred in refusing to grant certain defense jury instructions.

IX. The trial court erred in granting the State's Jury I - struction 1.

X. It was error to overrule defense objections to the prosecution's argument, "you can sentence . . . that's just your sentence."

XI. The trial court erred in overruling defense objections to the prosecution's argument that the co-defendant received a light sentence because in the prosecutor's opinion, "We had no other choice. In my opinion, we were lucky to get five — . . . because we had one shred of evidence and we could see that slipping away from us and we took what we could get —", where the record did not support such statements and such statements were untrue.

2/ In his petition for writ of certiorari to this Court Evans raised alternative grounds. The first was couched in terms of Zant v. Stephens, ____ U.S. ____, contending that the Court found that the evidence did not adequately support the jury's findings that the murder was "especially heinous, atrocious or cruel." Concomitantly, petitioner raised a challenge under Godfrey v. Georgia, 446 U.S. 420 (1980), to the interpretation placed on the term "especially heinous, atrocious or cruel" by the Mississippi Courts.

On February 1, 1984, petitioner filed an application for stay of execution with the Mississippi Supreme Court. On February 3, 1984, the Honorable Roy Noble Lee, Presiding Justice, speaking for the Court denied the stay. An application for stay of execution was filed contemporanously with the instant petition on February 7, 1984, the Honorable Harry A. Blackmun, Acting Circuit Justice, denied the stay.

On February 8, 1984, Evans pursuant to 28 U.S.C. § 2254 filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. See: Evans v. Thigpen, S.D. Miss. No. J84-0090(R). On February 9, 1984, the State informed the Court that it would not resist the motion for stay filed therein, and an appropriate order was entered. An Answer and Return has been filed, and the matter is currently pending before that Court.

VI. Reasons for Denying the Writ

A. Certiorari Should be Denied for Failure of the Petitioner to Timely Raise the Adequacy or Application of the State Rules of Procedural Forfeiture in Either His Application or Petition for Rehearing in the Mississippi Supreme Court

In the recent case of Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984), the Court summarized the principles applicable to post-conviction collateral relief in Mississippi and whether several recent cases were aberations in the stare decisis on the subject:

> There is no need to dwell at length on the principles of law necessary to be considered by this Court in determining whether or not Petitioner's application should be sustained or denied. We have clearly announced the principles before us in a number of cases both recently and in the past. See, Smith v. State, 434 So.2d 212 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); Callahan v. State, 419 So.2d 165 (Miss. 1982); Holloway v. State, 261 So.2d 799 (Miss. 1972); Botts v. State, 210 So.2d 777 (Miss. 1968); and Corry v. Buddendorf, 98 Miss. 98, 54 So. 84 (1911).

In Callahan, supra, we adopted the language in In Re Broome's Petition 251 Miss. 25, 168 So.2d 44 (1964), by saying the following:

> The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. There must be some error of fact and not of law affecting substantially the validity and regularity of the proceeding, which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking relief. It is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial.

In the recent case of Smith v. State, supra, we stated:

> We are compelled to note that in the instant case, as is all too often the case in similar post-conviction relief efforts which come before this Court, the petitioner is in actuality seeking to relitigate his case. Such is not the proper function of post-conviction relief proceedings in Mississippi. The fair and orderly administration of justice dictates that a person accused of a crime be afforded the opportunity to present his claims before a fair and impartial tribunal. It does not require that he be given multiple opportunities to "take a bit at the apple." Likewise, the orderly administration of justice does not require this Court to "lead a defendant by the hand" through the criminal justice system. It is this Court's responsibility to provide a meaningful opportunity for defendant to raise his claims and have them adjudicated.

In Botts v. State, supra, we said:

> The function of a writ of error coram nobis is to bring to the court's attention some matter or fact which does not appear on the face of the record which was unknown to the court or the parties at the time, and which, if known, and properly presented, would have prevented the rendition of the original judgment.

In Holloway v. State, supra, we find the following:

> Moreover, if there was prejudice resulting from the "show up" or "line up," the facts and circumstances were known to petitioner and petitioner's present objection should have been raised at the trial. No such proposition was advanced or submitted to the trial court, either as a pre-trial matter or in the course of the trial. Nor was it assigned as a ground in petitioner's motion for a new trial. A defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again.

Regarding matters previously litigated , we stated in Edwards v. State, 433 So.2d 906 (Miss. 1983), the following:

> The present issue is contended to be focusing on the inflammatory and prejudicial remarks of the prosecution. At this point it should be noted that if the issue was raised on appeal then it has been previously litigated and therefore is barred from consideration in the present proceedings. If it were not raised on appeal, then the petition has accepted the trial court's determination of the issue. Analysis for the petitioner's ground of relief show that it was not raised on direct appeal. Objection was made at trial to the remarks of the district attorney, but the failure to specifically assign such as error in the direct appeal before this court resulted in petitioner's acceptance of the trial court's determination of this issue; therefore it is now barred.
>
> Id., at 822-23.

This ruling should be overlaid with the Court's en banc decision in Read v. State, 430 So.2d 832 (Miss. 1983), discussing the principle that the rules concerning procedural forfeiture are not applicable unless the defendant was given a meaningful opportunity to assert his right and obtain a hearing before the trial court.

For the most part applications to the Mississippi Supreme Court were and are denied without opinion. In Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983), and Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983), the Courts interpreted these orders to be decisions on "the

merits." Cf., Norman v. Lucas, S.D. Miss. No. E81-0005(C) (Report and Recommendation of Magistrate Roper dated September 15, 1982, adopted as the opinion of the Court October 28, 1982), Fifth Circuit No. 82-4551 (C.P.C. denied per Johnson, J.), pet. for cert. filed, No. 83-5733; Bullock v. Lucas, S.C. Miss. No. J81-0357(N) (op. dated June 30, 1983), appeal docketed, No. 83-4705 (5th Cir., Oct. 1983). Apparently tiring of Federal misinterpretation of their actions the Mississippi Supreme Court, pursuant to their inherent authority to construe questions of State law, United Gas Pipeline Co. v. Ideal Cement Co., 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed.2d 623 (1962), Hall v. Wainwright, 493 F.2d 37 (5th Cir. 1969), Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981), in King v. Thigpen, 441 So.2d 1365, 1366 n. 1 (Miss. 1983), held:

> We address each issue raised on this petition because several of our orders disposing of post-conviction relief petitions which were denied without opinions have been erroneously interpreted to be decisions on the merits. Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983); Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983). In those cases, more or less routine orders were entered on the minutes by the Clerk of this Court. We do not consider those orders to be opinions of this Court and they do not mean that each issue raised was considered on the merits. In fact, the issues raised were, for the most part, procedurally barred. Such routine orders heretofore or hereafter entered by the Clerk of this Court would more appropriately be reviewed under the guidelines of Preston v. Maggio, 705 F.2d 113 (5th Cir. 1983), and not under Miller v. Estelle, 677 F.2d 1080 (5th Cir. 1982).

The jurisdiction of this Court to consider these rules is grounded upon questions of constitutional significance which have been adequately raised and considered in the State courts. See: 28 U.S.C. § 1257. See also: Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); Street v. New York, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969); Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Florida v. Casal, ____ U.S. ____, 77 L.Ed.2d 277 (1983).

Specifically, we note that petitioner failed to raise in either his application or petition for rehearing any question concerning the adequacy of Mississippi's rules of procedural forfeiture. Concomitantly, we note that the issues discussed under Proposition I are raised here for the first time. This Court has consistently held that it will not review issues which were not raised in the courts below unless there are "exceptional circumstances." United States v. Lovasco, 431 U.S. 783, 788 n. 7, 52 L.Ed.2d 752, 758, 97 S.Ct. 2044 (1977); Duignan v. United States, 274 U.S. 195, 200, 71 L.Ed. 996, 1000, 47 S.Ct. 566 (1927). See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 44 L.Ed.2d 29, 95 S.Ct. 1504 (1975); Tacon v. Arizona, 410 U.S. 351, 35 L.Ed.2d 346, 93 S.Ct. 998 (1973); Ramsey v. United Mine Workers, 401 U.S. 302, 28 L.Ed.2d 64, 91 S.Ct. 658 (1971); Adickes v. Kress & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970); Tyrell v. District of Columbia, 243 U.S. 1, 61 L.Ed. 557, 37 S.Ct. 361 (1917). No "exceptional circumstances" exist that should cause this Court to consider this new issue.

B. Certiorari Should Be Denied Because This Court is Precluded From Considering the Question of Discriminatory Application of the Death Penalty Since the Mississippi Supreme Court Denied Relief on the Basis of State Rules of Procedure

Unlike the previous question, it is clear that the instant proposition was fully raised in Evans' Application before the Mississippi Supreme Court. In substance, relying on the rulings in Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983), Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), and Stephens v. Kemp, ____ U.S. ____, 78 L.Ed.2d 370 (1983), petitioner argues that his sentence of death should be set aside because it is "a product of a capital sentencing scheme that discriminates on the basis of rase in violation of the eighth and fourteenth amendments." Pet. for Cert. p. i.

In denying this claim the Mississippi Supreme Court held:

> 9. Arbitrariness of the Death Penalty in Mississippi
>
> 10. Discriminatory Aspects of the Death Penalty in Mississippi
>
> Evans contends that (9) his sentence is disproportionate and arbitrary and (10) the death penalty in Mississippi is imposed in a discriminatory manner. Those contentions were not presented on the direct appeal, they are unpreserved and are procedurally barred. Smith, supra; Edwards, supra; Wheat, supra.
>
> Evans v. State, 441 So.2d at 523. 3/

3/ We invite the Court's attention to the fact that petitioner, contrary to the requirements of Rule 38, Miss. Sup. Ct. Rules, failed to support his allegations concerning his claims of discriminatory application of the death penalty with any offer of proof. Likewise, he has only made reference to general statistics here and has made no effort to show how the State of Mississippi has discriminated against him personally. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

See also: Smith v. State, 434 So.2d 214 (Miss. 1983); Pruett v. Thigpen, supra; Gilliard v. State, ____ So.2d ____ (Miss. No. 53,959, 1984).

The decision of the Mississippi Supreme Court, therefore, rests upon an independent State ground, and this Court should deny discretionary review. Fay v. Noia, 372 U.S. 391, 428-29, 9 L.Ed.2d 836, 863, 83 S.Ct. 822 (1963); Parker v. North Carolina, 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (1970); Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966). Accord: Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982).

VII. Conclusion

As indicated infra, petitioner is currently seeking habeas corpus relief in the United States District Court of the Southern District of Mississippi. While we do not concede that the questions concerning the

adequacy or application of Mississippi's rules of procedural forfeiture have been adequately exhausted, Rose v. Lundy, 455 U.S. 509, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), we note that they do involve complex questions of State law.

In Bishop v. Wood, 426 U.S. 341, 346 n. 10, 96 S.Ct. 2074, 48 L.Ed.2d 684, 691 n. 10 (1976), this Court commented upon the deference to be paid to rulings by district court judges on questions of State law:

> In Propper v. Clark, 337 U.S. 472, 486-487, 93 L.Ed.2d 1480, 69 S.Ct. 1333, the Court stated: "The precise issue of state law involved, i.e., whether the temporary receiver under § 977-b of the New York Civil Practice Act is vested with title by virtue of his appointment, in one which has not been decided by the New York courts. Both the District Court and the Court of Appeals faced this question and answered it in the negative. In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be reasonable." In Township of Hillsborough v. Cromwell, 326 U.S. 620, 629-630, 90 L.Ed. 358, 66 S.Ct. 445, the Court stated, "Petitioner makes an extended argument to the effect that Duke Power Co. [v. State Board, 129 NJL 449, 30 A2d 416, 131 NJL 275, 36 A2d 701,] is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts 'who are familiar the intricacies and trends of local law and practice.' Huddleston v. Dwyer, 322 U.S. 232, 237, 88 L.Ed. 1246, 64 S.Ct. 1015. We are unable to say that the District Court and the Circuit Court of Appeals erred in applying to this case the rule of Duke Power Co. v. State Board, which involved closely analogous facts." And in MacGregor v. State Mut. Life Assur. Co., 315 U.S. 280, 86 L.Ed. 846, 62 S.Ct. 607, the Court stated, "No decisions of the Supreme Court of Michigan, or any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan." [emphasis added].

We urge the Court to exercise its discretion and deny the petition for writ of certiorari. Obviously, this is not the last time this Court

will see this case. Respondent suggests that the optimum course of action would be to deny certiorari and to allow the lower Federal courts to thrash out the question, if such is cognizable, and then upon their studied opinions pass upon the questions.

For these reasons, we, therefore, suggest denial of the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General for the State of Mississippi do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to the following:

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This, the 23rd day of April, 1984.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

prejudicial. McLeod v State, 130 M 83, 92 So 828.

Permitting district attorney in his closing argument to refer to defendant in prosecution for murder as a "black gorilla," is reversible error. Harris v State, 209 M 141, 46 So 2d 91.

17. Matters pertaining to record

Assignments without basis in record will not be considered. Higgins v State, 120 M 823, 83 So 245.

Without judgment of circuit court showing establishment, it is presumed certification of record was not established in circuit court on appeal from justice. Brasham v State, 140 M 712, 106 So 280.

Where record did not contain judgment of justice court, appeal bond, or transcript of proceedings in justice court, but such transcript was unnecessary for understanding of proceedings in circuit court, statute prevents reversal. McCluney v State, 162 M 333, 138 So 356.

Statute required presumption that proper appeal bond was executed by one appealing from justice court requiring his attendance at court until appeal was disposed of. McCluney v State, 162 M 333, 138 So 356.

Justice court record which included copy of affidavit, warrant for arrest, appearance bond, and judgment, with justice's certificate that such was a true and correct copy, held sufficient to give circuit court jurisdiction of appeal. Stewart v State, 179 M 31, 174 So 579.

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. Lee v State, 190 M 877, 1 So 2d 492, 2 So 2d 148.

Although under the statutes it is still mandatory that the justice of the peace, or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law. Whittington v State, 218 M 631, 67 So 2d 515.

§ 99-35-145. Coram nobis after affirmance of conviction—appeal from grant or denial of writ.

(1) Except as hereinafter otherwise provided, the writ of error coram nobis, and the procedure therefor, as heretofore defined by the decisions of the supreme court of this state, is hereby recognized by statute.

(2) In all cases wherein a judgment of conviction in a criminal prosecution has been affirmed on appeal by the supreme court, no petition for the writ of error coram nobis shall be allowed to be filed or entertained in the trial court unless and until the petition for the writ shall have first been presented to a quorum of the justices of the supreme court, convened for said purpose either in term time or in vacation, and an order granted allowing the filing of such petition in the trial court.

(3) No application for leave to file a petition for the writ shall be

heard or considered by the court except on three days written notice thereof personally served on the attorney general or one of his assistants, provided, however, the three day rule may be waived for grounds sufficiently urgent and necessary to due process as to cause any justice to order the same, and provided further that in all cases the attorney general shall have actual, advance notice, where possible to give the same.

(4) Upon consideration of the application for leave to file the petition for the writ, the justices before whom the matter is pending may require the applicant or the state to submit oral testimony, subject to cross-examination, to support the allegations of the application or the petition or any answer thereto, and a failure to comply with such order shall be sufficient ground for the denial of the application.

(5) Upon order and mandate granting leave to file the petition, the trial court with all reasonable dispatch, on a day to be fixed by its order, shall proceed to the hearing of the petition. The trial court may require the parties to adduce evidence in support of their contentions, including oral proof it considered necessary, and the failure by the petitioner to adduce oral proof, when the same has been ordered, shall be sufficient ground for the dismissal of the petition.

(6) Either the state or the petitioner may appeal to the supreme court from an order of the trial court granting or denying the writ, but written notice of such appeal shall be filed with the clerk of the trial court not later than two full calendar days after the day and date of the order desired to be appealed from. This requirement shall be jurisdictional on appeal.

(7) Upon appeal, the record and the transcript of the testimony shall be made up with all reasonable dispatch and filed in the supreme court, after which the court, on a day not more than ten (10) days thereafter, to be fixed by order of the chief justice, shall proceed to hear and determine the appeal, whether or not the court be in formal recess at the time.

(8) If the petitioner or petitioners be under sentence of death and the day fixed for the execution of the sentence shall arrive at a time when proceedings for the writ are on file and pending adjudication, then the execution of the sentence shall be automatically stayed and the tribunal then having jurisdiction of the matter shall so notify the sheriff of the county of conviction, and the superintendent of the state penitentiary. If, however, there shall have been such an automatic stay of execution and the application or writ shall be denied, then the tribunal having jurisdiction of

such application or petition shall forthwith fix a day, not more than twenty-one (21) days distant, for the execution of the sentence, and mandate or warrant shall forthwith issue accordingly.

(9) The decision of all grounds litigated, in an application for leave to file, or upon the petition itself where leave is granted, shall be res judicata of such grounds raised in any subsequent application or petition.

SOURCES: Codes, 1942, § 1992.5; Laws, 1952, ch. 250, §§ 1-10.

Research and Practice References—

18 Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 1 et seq.

Coram nobis in criminal practice, 7 Am Jur Pl & Pr Forms (Rev ed), Coram Nobis and Allied Statutory Remedies, Forms 11 et seq.

ALR Annotations—

Writ of coram nobis as remedy of one convicted of crime while insane. 10 ALR 214, 121 ALR 268.

Correcting clerical errors in judgments. 10 ALR 643, 67 ALR 850, and 126 ALR 997.

Writ of error coram nobis as remedy where plea of guilty is entered under fraud, duress, or mistake. 30 ALR 686.

Coram nobis on ground of newly discovered evidence. 33 ALR 84.

Coram nobis for matters relating to jury. 36 ALR 1445.

Insanity of witness as ground of writ of error coram nobis. 43 ALR 1387.

Right to writ of coram nobis as affected by intentional or negligent failure to bring facts to attention of court. 58 ALR 1286.

Writ of coram nobis after affirmance. 145 ALR 818.

Right to change of judges on issues raised by petition for writ of error coram nobis. 161 ALR 540.

Habeas corpus on ground of denial of review of coram nobis 19 ALR2d 825.

Delay as affecting right to coram nobis attacking conviction. 62 ALR2d 432.

JUDICIAL DECISIONS

1. In general

This section [Code 1942, § 1992.5] provides a comprehensive procedure for the rehearing of criminal cases wherein errors of a constitutional nature have occurred. King v Cook, 287 F Supp 269.

The purpose of the legislature in enacting this section [Code 1942, § 1992.5] was to provide a meaningful and effective procedure for the protection of constitutional rights to those convicted of crime, and the highest court of the state has interpreted the act in accordance with that purpose. King v Cook, 287 F Supp 269.

The general scope of a petition for writ of error coram nobis is to bring before the court a judgment previously rendered by it, and it is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record which deprive the accused without fault on his part of the constitutional right to a fair trial. Re Broom's Petition, 251 M 25, 168 So 2d 44.

Coram nobis, not habeas corpus, is

Harris also argues that his conviction is reversible because of certain statements made by the trial court during the course of the trial. Because we have no doubt that these statements will not be repeated at retrial, we do not feel compelled to address the issue.

Based on all of the foregoing, we hold that Larry Aubron Harris' conviction of manslaughter is hereby reversed and remanded to the Circuit Court of Tishomingo County.

REVERSED AND REMANDED.

PATTERSON, C.J., WALKER and ROY NOBLE LEE, P.JJ., and BOWLING, HAWKINS, PRATHER, ROBERTSON and SULLIVAN, JJ., concur.

In re Robert C. GILLIARD, Jr.

v.

STATE.

No. 53959.

Supreme Court of Mississippi.

Feb. 22, 1984.

Defendant was convicted before the Circuit Court, Jones County, James D. Hester, J., on guilty plea to capital murder during commission of armed robbery and was sentenced to death. In original proceeding on application for leave to file petition for writ of error coram nobis, the Supreme Court, Roy Noble Lee, P.J., held that: (1) defendant who has litigated matters of fact and law at trial, and whose conviction has been affirmed, may not, through writ of error coram nobis, present and litigate question again, even though then framed and placed in setting of federal constitutional questions; (2) questions adjudicated on appeal constituted res judicata and were procedurally barred; (3) petitioner was entitled to evidentiary hearing on voluntariness of guilty plea and question of effectiveness of counsel interwoven therewith; and (4) questions which were not alleged as error and raised on direct appeal could not be raised for first time on application for leave to file petition for writ of error coram nobis and were procedurally barred.

Application granted in part and denied in part.

Robertson, J., specially concurred and filed opinion.

1. Criminal Law ⇐997.7

Defendant who has litigated matters of fact and law at trial and whose conviction has been affirmed, may not, through writ of error coram nobis, present and litigate question again, even though then framed and placed in setting of federal constitutional questions.

2. Criminal Law ⇐997.7

Questions adjudicated on direct appeal constituted res adjudicata and were procedurally barred from being raised on petition for writ of error coram nobis.

3. Criminal Law ⇐997.16(4, 5)

On petition for writ of error coram nobis, state prisoner was entitled to evidentiary hearing on voluntariness of his guilty plea and question of effectiveness of counsel interwoven therewith.

4. Criminal Law ⇐997.2

Questions which were not alleged as error and raised on direct appeal could not be raised for first time on application for leave to file petition for writ of error coram nobis and were procedurally barred.

5. Criminal Law ⇐997.7

Questions alleged as error and adjudicated on direct appeal could not be relitigated on petition for writ of error coram nobis and were procedurally barred, notwithstanding that questions either added federal constitutional argument to that

made on direct appeal or reframed direct appeal argument in federal constitutional terms.

J. Ronald Parrish, Laurel, Lionel R. Barrett, Jr., Nashville, Tenn., for appellant.

Bill Allain, Atty. Gen. by Charles W. Maris, Jr., Sp. Asst. Atty. Gen., Jackson, for appellee.

En Banc.

ROY NOBLE LEE, Presiding Justice, for the Court:

Petitioner, Robert C. Gilliard, Jr., was indicted in the Circuit Court of the Second Judicial District, Jones County, Mississippi, during the September 1981 Term, for the capital murder of Grady Chance during the commission of an armed robbery at the Best Chance Package Store in Laurel, Mississippi.

Gilliard entered a plea of guilty to the charge and the trial proceeded on the sentencing phase. After hearing the evidence, receiving the instructions from the court, and argument of counsel, the jury found Gilliard guilty and sentenced him to death.

The judgment of the lower court was appealed to the Mississippi Supreme Court and was affirmed. *Gilliard v. State*, 428 So.2d 576 (Miss.1983). Gilliard did not file a petition for rehearing.

A petition for a writ of certiorari to the Supreme Court of Mississippi was filed in the United States Supreme Court and denied on October 3, 1983. Application for Leave to File Petition for Writ of Error Coram Nobis was filed in this Court November 7, 1983, setting out twenty-nine (29) grounds for relief, and was responded to by the State on November 28, 1983. We address each of the grounds for relief hereinafter.

Section A.

I.

The Court Erred in Overruling Petitioner's Motion for Change of Venue.

On direct appeal to the Mississippi Supreme Court, the petitioner assigned as error that the lower court erred in overruling his motion for change of venue. The lower court received evidence on the question, and it was thoroughly presented there. On appeal to this Court, it was completely considered and addressed. *Gilliard v. State, supra*, at 578-79.

However, the petitioner now contends that the motion should have been granted and that denial of the motion was of constitutional magnitude and that petitioner was denied a fair trial in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, citing *Anderson v. State*, 92 Miss. 656, 46 So. 65 (1908); *Eddins v. State*, 110 Miss. 780, 70 So. 898 (1916); and *Bond v. State*, 128 Miss. 792, 91 So. 461 (1922).

The question now before this Court is whether or not, under state procedure and law, petitioner may raise the question and attack the judgment on federal constitutional grounds. In *Minor v. Lucas*, 697 F.2d 697 (5th Cir.1983), Minor neglected to frame in state court the constitutional claims found in his federal habeas petition. The Fifth Circuit commented as follows:

> It is far from certain, however, that *Holloway* [261 So.2d 799 (Miss.1972)] and *Auman* [285 So.2d 146 (Miss.1973)] stand for the proposition that the petitioner is barred from presently raising his federal constitutional claims in the Mississippi courts. The statement quoted above from *Holloway* was made at the close of the opinion after the court had specifically found that the petitioner's federal constitutional claim was meritless. In *Auman*, the petitioner did not frame any of the issues he raised in his writ as federal constitutional claims, but rather framed his contentions as they apparently had been litigated in his direct criminal appeal.

Furthermore, there seems to be ample Mississippi precedent that the writ of error coram nobis is available to attack collaterally a judgment of conviction on federal constitutional grounds. *See, e.g.*,

King v. Cook, 287 F.Supp. 269, 272 (N.D. Miss.1968) (purpose of Mississippi's writ of error coram nobis is to provide meaningful and effective procedure for protection of constitutional rights of those convicted of crime); *Nelson v. Tullos*, 323 So.2d 539, 543 (Miss.1975) (relief for a defendant who claims to have been convicted as a result of a deprivation of his constitutional rights is by a writ of error coram nobis).

We decline to resolve this question presented by the parties, but rather leave it to the state courts to determine whether petitioner's federal constitutional claims will be entertained by way of a writ of error coram nobis. [697 F.2d at 698–99].

In *Callahan v. State*, 426 So.2d 801 (Miss.1983), quoting from *In re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (1964), we said:

> We first address the petition for writ of error coram nobis by recognizing a basic premise in this jurisdiction that such post-conviction petitions are limited in nature. Justice Ethridge, in case of *In re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (1964), set forth the circumstances in which a writ for error coram nobis would lie. His opinion states:
>
> > The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. *There must be some error of fact and not of law* affecting substantially the validity and regularity of the proceedings, *which was not brought into issue at the trial. Such motion or petition is an extraordinary* and residual *remedy to correct or vacate a judgment on facts* or grounds not appearing on the face of the record, not available by appeal or otherwise, and *not discovered until after rendition of the judgment of conviction, valid on its face, but defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial.* [Emphasis added]. [251 Miss. at 32–33, 168 So.2d at 48].
>
> With this background in mind, our Court has since ruled that the writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court. *Auman v. State*, 285 So.2d 146 (Miss.1973). Moreover, "a defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again." *Holloway v. State*, 261 So.2d 799, 800 (Miss.1972). [426 So.2d at 803].

[1] We resolve the question referred to in *Minor, supra*, and hold that a defendant in a criminal trial, who has litigated matters of fact and law at the trial, and whose conviction has been affirmed, may not, through a writ of error coram nobis, present and litigate the question again, even though then framed and placed in a setting of federal constitutional questions.

II.—IV.

The Court Erred in Failing to Excuse Certain Jurors for Cause at the Request of the Petitioner.

The Court Erred in Excusing Certain Jurors For Cause at the Request of the State.

The Court Erred in Failing to Quash the Jury Panel Which Actually Rendered the Death Sentence in this Case Because of the State's Use of Its Peremptory Challenges to Excuse All Persons of the Negro Race from the Panel Solely on the Basis of Their Race.

[2] The questions A–II, A–III, and A–IV were raised and denied on the direct appeal. They were adjudicated and constitute res adjudicata and are procedurally barred. *Smith v. State*, 434 So.2d 212 (Miss.1983); *Edwards v. Thigpen*, 433 So.2d 906 (Miss.1983); *Callahan v. State*, 426 So.2d 801 (Miss.1982); *Auman v.*

State, 285 So.2d 146 (Miss.1973); and *In Re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (Miss.1964).

V.

Removal of Jurors with Scruples Against Capital Punishment.

Petitioner's question A–V was not raised on direct appeal and it is procedurally barred. *Smith v. State, supra; Edwards v. Thigpen, supra; Wheat v. Thigpen*, 431 So.2d 486 (Miss.1983); *Callahan v. State, supra;* and *Holloway v. State*, 261 So.2d 799 (Miss.1979).

Section B.

The Petitioner Should be Granted a New Trial in View of the Unconstitutional Aspects of His Plea of Guilty –

In its response to this question, the State conceded the need for an evidentiary hearing for the purpose of resolving the voluntariness of the guilty plea, although it did not concede that petitioner has met the pleading requirements established by this Court in *Tiller v. State*, 440 So.2d 1001 (Miss.1983), and did not concede the merits of petitioner's contention that the plea was unconstitutional.

[3] When we now consider this question, along with Section D, addressed hereinafter, we hold that petitioner be given an evidentiary hearing on the voluntariness of his guilty plea.

Section C.

Proposition I: Appellate Procedures

Proposition II: Alleged Arbitrariness of Death Penalty

Proposition III: Alleged Discriminatory Nature of Death Penalty

Proposition XIV: Trial Court's Report

[4] Question C–I, C–II, C–III and C–XIV were not alleged as error and raised on direct appeal. The questions may not now be raised for the first time on this Application for Leave to File the Petition for Writ of Error Coram Nobis and are procedurally barred. *Smith v. State, supra; Edwards v. Thigpen, supra; Wheat v. Thigpen*, supra; *Callahan v. State, supra; Holloway v. State, supra.*

Proposition IV: The Heinous, Atrocious, and Cruel Aggravating Circumstance.

Proposition V: The Failure to Instruct the Jury as to the Deal Made with a State Witness

Proposition VI: Closing Argument

Proposition VII: The Refusal of Instruction D–2

Proposition VIII: The Refusal of Instruction D–4

Proposition IX: The Refusal of Instruction D–6

Proposition X: The Refusal of Instruction D–9

Proposition XI: "Doubling Up" of Aggravating Circumstances

Proposition XII: The Heinous, Atrocious, and Cruel Aggravating Circumstance

Proposition XIII: The Refusal to Impose a Life Sentence

Petitioner's questions C–IV, –V, –VI, –VII, –VIII, –IX, –X, –XI, –XII, and –XIII, were alleged as error and adjudicated on direct appeal. They are now res adjudicata, may not be relitigated on this petition and are procedurally barred. *Smith v. State, supra; Edwards v. Thigpen, supra; Callahan v. State, supra; Auman v. State*, 285 So.2d 146 (Miss.1973); *In Re Broom's Petition, supra.*

[5] Further, the questions C–IV, –VI, –VIII, –IX, –X, –XII, and –XII, either added a federal constitutional argument to that made on direct appeal, or reframe the direct appeal argument in federal constitutional terms. As we have stated and addressed on the question A–I, motion for change of venue, the principle there applies to these questions. They may not be relitigated on this petition for writ of error coram nobis and are procedurally barred.

Section D.

Petitioner was Denied the Effective Assistance of Counsel at His guilt and Sentencing Trials in Violation of the Sixth, Eighth and Fourteenth Amendments

Under the general question posed in Section D, petitioner has raised questions D–I

through D–IX. The sub-question D–VI relates to the entry of the guilty plea at the first phase, or guilt phase, of the trial. The question is interwoven with the question of effective assistance of counsel. The State concedes that there should be an evidentiary hearing on question B and on question D, although the State does not concede the merits of petitioner's allegations.

We are of the opinion that there should be an evidentiary hearing on question B and question D, guilty plea and effectiveness of counsel. Therefore, the Motion and Application for Leave to File the Petition for Writ of Error Coram Nobis is granted as to the questions presented in Sections B and D.

APPLICATION GRANTED IN PART AND DENIED IN PART.

PATTERSON, C.J., WALKER, P.J., and BOWLING, HAWKINS, DAN M. LEE, PRATHER and ROBERTSON, JJ., concur.

ROBERTSON, J., specially concurs.

SULLIVAN, J., not participating.

ROBERTSON, Justice, specially concurring:

I concur unreservedly in the result reached in the majority opinion authored by Presiding Justice Roy Noble Lee. At several points, however, I differ as to the grounds that ought to be relied upon.

With respect to Section A [I–IV] and Section C [IV–XIII] of the majority opinion, I agree that claims which have been fully litigated at trial and adjudicated on their merits on direct appeal generally ought not be available for relitigation via post-conviction proceedings, even though framed with different terminology. Any such attempt at relitigation ought, in my view, be barred by familiar notions of collateral estoppel. See my special concurring opinion in *Edwards v. Thigpen*, 433 So.2d 906, 909–910 (Miss.1983); and my dissenting opinion in *Evans v. State*, 441 So.2d 520, 534 (Miss. 1983).

I have carefully reviewed the claims presented under Section A[V] and Section C [I–III and XIV] and find them to be wholly without merit. I would deny those on their merits. It continues to escape me why claims such as these, wholly lacking in substantive merit, should be dealt with on procedural grounds. See my special concurring opinion in *Pruett v. Thigpen*, 444 So.2d 819 (Miss.1984).

I concur in what has been said in Section B of the majority opinion. I concur further in what has been said in Section D to the effect that an evidentiary hearing should be held on the question of whether Gilliard has been denied his constitutional right to the effective assistance of counsel. See *Read v. State*, 430 So.2d 832, 836–842 (Miss.1983).

McGOLDRICK OIL COMPANY

v.

GREENE COUNTY.

No. 54160.

Supreme Court of Mississippi.

Feb. 29, 1984.

Appeal was taken from order of the Circuit Court, Greene County, Robert T. Mills, J., dismissing action against county based on collision between plaintiff's mobile oil rig and dump truck owned and operated by county. The Supreme Court, Walker, P.J., held that doctrine of sovereign immunity barred action against county.

Affirmed.

Automobiles ⇐187

Doctrine of sovereign immunity barred suit against county based upon collision

AFFIDAVIT OF SERVICE

Catherine W. Underwood, being duly sworn, states the following:

1. I am counsel for the respondents in the above-captioned action and am a member of the Bar of this Court.

2. On April 23rd, 1984, at approximately 3:45 p. m., I personally placed the original and nine (9) copies of the enclosed Respondents' Brief in Opposition in an envelope properly addressed to the Clerk of this Court, with first-class postage prepaid, and deposited the package in a mailbox under the exclusive control, care, and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

3. I placed a copy of said Brief in Opposition in an envelope properly addressed to Shirley Payne, Esquire, Post Office Box 1725, Jackson, Mississippi 39215 and to Steven L. Winter, Esquire, 99 Hudson Street, 16th Floor, New York, New York 10013, with first-class postage prepaid, and deposited the packages in a mailbox under the exclusive control, care, and custody of the United States Postal Service within the City and State oif Jackson, Mississippi.

Catherine W. Underwood
CATHERINE W. UNDERWOOD
ASSISTANT ATTORNEY GENERAL

Sworn to and Subscribed before me on this the 23rd day of April, 1984.

Irene C. Hudson
NOTARY

My Commission Expires:

My Commission Expires October 22, 1984.